

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ONYX PHARMACEUTICALS, INC.,

No. C-09-2145 EMC

Plaintiff,

v.

**FINAL PRETRIAL CONFERENCE  
ORDER**

BAYER CORPORATION, *et al.*,

Defendants.

A Final Pretrial Conference was held in this matter on September 20, 2011. Pursuant to Federal Rule of Civil Procedure 16(e), this order memorializes the Court's rulings and/or the parties' stipulations. Also attached are the Court's standing Guidelines for Trial.

**I. TRIAL DATE & LENGTH OF TRIAL**

The trial shall begin on October 3, 2011, Courtroom 5, 17th Floor. There shall be a total of twelve court days.

Trial shall be conducted from 8:30 a.m. to 2:00 p.m. (or slightly longer to finish a witness), with one 15-minute break and one 40-minute lunch break. Parties must arrive by 8:00 a.m. or earlier as needed for any matters to be heard out of the presence of the jury. The jury will be called at 8:30 a.m. The trial week is Monday through Thursday, excluding holidays. Fridays are dark. If there are matters that need to be discussed (*e.g.*, objections to exhibits or witnesses), counsel should be prepared to meet with the Court at 8:00 a.m.

Plaintiff shall have 22 hours to present her evidence, and Defendant 22 hours. This includes direct examination by one side of its witnesses, cross-examination by that side of the opposing

1 party's witnesses, and any rebuttal. This does not include jury selection, jury instructions, opening  
 2 statements, or closing arguments. The Court may impose separate time limits for openings and  
 3 closings.

## 4 **II. MOTIONS IN LIMINE**

### 5 **A. Defendant's Motion in Limine (Docket No. 140)**

6 Bayer's Motion in Limine requests that the Court exclude four categories of evidence. For  
 7 the reasons set forth below, the Court DENIES the motion without prejudice.

#### 8 **1. Evidence of Negotiators' Unexpressed Intent**

9 Bayer seeks to prevent Onyx from introducing evidence as to the unexpressed intent and  
 10 understanding of Onyx's negotiators to the Collaboration Agreement. Mot. in Limine, Docket No.  
 11 140 ("Mot."), at 1. These witnesses are Frank McCormick, Bob Jones, and Hollings Renton. Bayer  
 12 contends that their testimony as to the meaning of the contract is inadmissible under Rule 402 and  
 13 403 because they merely testify as to their own subjective, which is irrelevant under California law.  
 14 Mot. at 2. Bayer asks the Court to restrict the testimony of these witnesses to objective, expressed  
 15 intent rather than subjective, understood intent. Onyx counters that these witnesses will testify not  
 16 as to their subjective intent, but rather the parties' mutual intent and understanding of the contract  
 17 terms. It argues that the witnesses are permitted to testify as to expressed and unexpressed  
 18 representations during the course of negotiations. Opp. at 1.

19 Bayer overstates California law's restrictions on witness testimony as to a contract's  
 20 meaning under the objective theory of contracts. Bayer seeks to exclude these witnesses' testimony  
 21 based on their admissions at some point in their depositions that they did not recall "specific  
 22 discussions" during the course of negotiations as to the meaning of certain specific words in the  
 23 contract. See Mot. at 2-3 (citing portions of Renton depo.); *id.* at 4 (citing portions of McCormick  
 24 depo.); *id.* (citing portions of Jones depo.). However, contrary to Bayer's implication, these  
 25 admissions do not amount to any broad concession that these witnesses remember nothing from the  
 26 negotiations that would inform their memory of and testimony as to the parties' expressed intent. A  
 27 lack of specific recollection does not change the nature of the testimony, only its weight. None of  
 28

1 the cases to which Bayer cites require witnesses to quote from negotiations or provide a detailed  
 2 account of “specific discussions” in order to testify as to their memory of those negotiations. For  
 3 example, Bayer cites to *Founding Members of Newport Beach Country Club v. Newport Beach*  
 4 *Country Club, Inc.*, 109 Cal. App. 4th 944, 960 (2003). However, *Founding Members* does not  
 5 stand for the broad proposition that all testimony as to a negotiator’s understanding of contract terms  
 6 is inadmissible. Rather, *Founding Members* merely holds that conversations between members of  
 7 the same side in a negotiation, conversations between those persons and a sales assistant,  
 8 conversations with undisclosed third parties, and undisclosed statements of individual intent are not  
 9 relevant under the “objective theory of contracts.” *Id.* Other cases on which Bayer relies for support  
 10 similarly do not discuss or require the specificity it requests that this Court impose. *See Winet v.*  
 11 *Price*, 4 Cal. App. 4th 1159, 1166 (1992) (disregarding “testimony as to what [the witness]  
 12 subjectively understood and intended the release to encompass”); *Habitat Trust for Wildlife, Inc. v.*  
 13 *City of Rancho Cucamonga*, 175 Cal. App. 4th 1306, 1339 (2009) (affirming exclusion of self-  
 14 described subjective statement: “I on behalf of Sage Council and Habitat Trust contemplated that the  
 15 contract purpose of the Settlement Release Agreement (Exhibit 41) was to . . . ,” where the witness  
 16 “does not indicate that she expressed her asserted intention to anyone before or at the time of  
 17 contracting” and “her prior language, acts and conduct evidence a contrary intention”).

18 In contrast to these cases and others cited by Bayer, here Onyx’s witnesses were present at  
 19 the negotiations and contend their understanding of the meaning of contract terms is based on the  
 20 course of those negotiations. *See, e.g.*, Schenker Decl., Exh. 1 at 98 (excerpt of Renton depo. in  
 21 which he states that he recalls talking about the definition of a collaboration compound with Bayer  
 22 and that the “intent” to which he refers is based on “the assurances that Bayer gave us”); *id.*, Exh 26  
 23 at 5 (McCormick’s declaration explaining the course of the negotiations in which he participated and  
 24 his understanding of the contract based on those negotiations); *id.*, Exh. 27 at 2-4 (Jones’s  
 25 declaration explaining the parties’ notes and negotiations as to what would constitute a  
 26 Collaboration Compound). This kind of extrinsic evidence is permitted, and indeed required, under  
 27 California law. *See Dept. of Indus. Relations v. UI Video Stores, Inc.*, 55 Cal. App. 4th 1084, 1094  
 28 (1997) (“[T]he circumstances surrounding the execution of the contract may be considered in

determining the meaning of the language used therein.”) (citing Cal. Code Civ. Proc., § 1860); *Pac. Gas & Elec. Co. v. G. W. Thomas Drayage and Rigging Co., Inc.*, 69 Cal. 2d 33, 39-40 (1968) (“[R]ational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties.”).

Moreover, while Bayer is correct that courts have excluded evidence of the unexpressed *intent* of the parties, other courts applying California law have allowed witnesses to testify about their *understanding* of a contract when that understanding is not simply a private interpretation, but rather is founded in personal knowledge of the negotiations and the parties’ expressed intent. *See First Nat’l Mortg. Co. v. Fed. Realty Inv. Trust*, 631 F.3d 1058, 1068 (9th Cir. 2011) (witness testified as to “his understanding of the ‘subject only to approval’ clause”); *Mickey Bearman Co. v. John Morrell & Co.*, No. CV-00-05616 CAS (MCX), 2001 U.S. Dist. LEXIS 26233, at \*6-7 (C.D. Cal. Oct. 29, 2001) (attorney “who participated in the negotiations of the [contract], is entitled to testify as to what he, as a representative of [Defendant], thought the ambiguous terms meant.”); *ASP Properties Group v. Fard, Inc.*, 133 Cal. App. 4th 1257, 1271 (2005) (“When [Defendant’s negotiator] was asked whether he understood at the time of negotiating the Amendment [that] Tenant would be required to improve the Premises, he answered, ‘Absolutely not.’”); *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 39 (1968) (offering, as example of circumstance warranting extrinsic evidence, situations in which “the parties’ understanding of the words used may have differed from the judge’s understanding” and requiring the court to consider evidence that would place it “in the same situation in which the parties found themselves at the time of contracting”); *Wolf v. Superior Court*, 114 Cal. App. 4th 1343, 1359-60 (2004) (finding triable issue of fact and lamenting the fact that “neither side presented any direct or objective evidence regarding the negotiating parties’ understanding of the term ‘gross receipts’ at the time the parties entered into the contract.”).

The Court cannot discern any requirement that testimony must be supported by specific quotations of the words stated in negotiation. Rather, California case law merely stands for the proposition that a negotiator’s testimony as to contract terms must be grounded in some foundation of personal knowledge as to the parties’ expressed intent and understanding during the course of

1 negotiations, rather than simply the witness's own subjective interpretation of the contract or intent  
 2 as to what the contract should mean. *See, e.g., Hoopes v. Dolan*, 168 Cal. App. 4th 146, 151 (2008)  
 3 (“The real estate agent said she conducted the lease negotiations with Hoopes, and that the issue of  
 4 parking ‘never came up’ during those negotiations.”). While Bayer is certainly free to impeach the  
 5 memory and credibility of these witnesses with their own deposition statements that they lacked  
 6 specific recall of what was stated in the negotiations as to various contract terms, these weaknesses  
 7 in their testimony are not sufficient to render them inadmissible.

8 Accordingly, Bayer’s motion is DENIED as to this point, without prejudice to Bayer’s  
 9 objections at trial if certain portions of the witnesses’ testimony are in fact based solely on their  
 10 subjective, unexpressed intent.

11 2. Evidence of Bayer’s Allegedly Improper Conduct Beyond CRC-KRAS & Breast  
 12 AI

13 Bayer seeks to preclude Onyx from introducing testimony with regard to Bayer’s other  
 14 allegedly improper conduct in the course of developing Nexavar in indications beyond CRC-KRAS  
 15 and Breast AI, as Onyx has not claimed compensatory damages with respect to that conduct. *See*  
 16 *Mot. at 1*. Bayer argues that such evidence is irrelevant under Rule 402, prejudicial under Rule 403,  
 17 and inadmissible character evidence under Rule 404(b).

18 At oral argument, Onyx agreed to drop four of the five indications and trials at  
 19 issue—pulmonary arterial hypertension (“PAH”); gastrointestinal stromal tumor (“GIST”); thyroid  
 20 cancer; and breast cancer in combination with the chemotherapy agent capecitabine (“Breast Cape”).  
 21 Thus, the Court only considers the parties’ arguments regarding 1st line colorectal cancer (“CRC”).

22 With respect to relevance, Bayer contends that evidence of Bayer's alleged efforts to block  
 23 Nexavar's development in CRC is irrelevant because Onyx does not claim any damages from this  
 24 conduct, and the fact of damages is a necessary component of Onyx's claims for breach of contract  
 25 and breach of fiduciary duty. *See Mot. at 6*. But as the Court pointed out at the hearing, the alleged  
 26 conduct as to 1st line CRC, if proven to be part of a larger campaign to promote DAST and  
 27 undermine Nexavar, is probative to Bayer's motive and conduct vis-a-vis the blocking of Nexavar  
 28 trials for which damages are sought. As Onyx noted, both provisions of § 3.6 arguably import (at

1 least the jury may so find) motive as an element of the breach claims. Section 3.6 makes Bayer's  
 2 motive for blocking Nexavar relevant to whether it has breached the contract because if Bayer  
 3 blocked Nexavar for legitimate business reasons and in good faith, there is no violation of § 3.6.  
 4 These documents are also relevant not just to show Bayer's "motive" to breach, but as direct  
 5 evidence of its alleged bad faith generally in violation of the implied covenant of good faith and fair  
 6 dealing. *See Universal Sales Corp. v. California Press Mfg. Co.*, 20 Cal.2d 751, 772 (1942) ("In  
 7 every contract there is an implied covenant that neither party shall do anything which will have the  
 8 effect of destroying or injuring the right of the other party to receive the fruits of the contract."). In  
 9 addition, as discussed above, Bayer's argument against offering evidence of motive is, at the least,  
 10 inapplicable to Onyx's tort-based claims.

11 Even assuming Bayer is correct that this conduct would be irrelevant for Onyx's damages  
 12 claims, Bayer neglects to address Onyx's remaining claims, including a claim for declaratory relief  
 13 in the form of "a declaration that Bayer cannot allow its products outside the Collaboration to  
 14 prejudice the development of Nexavar." Joint Pretrial Statement, Docket No. 142, at 7. While  
 15 Bayer seems to argue in reply that declaratory relief requires proof of damages as well, *see* Reply at  
 16 8, such an argument runs directly counter to the provisions of both the California and federal  
 17 declaratory judgment statutes. *See* Cal. Code Civ. Pro. § 1060 ("[T]he court may make a binding  
 18 declaration of these rights or duties, whether or not further relief is or could be claimed at the time. .  
 19 . . The declaration may be had before there has been any breach of the obligation in respect to which  
 20 said declaration is sought."); 28 U.S.C. § 2201(a) ("[A]ny court of the United States, upon the filing  
 21 of an appropriate pleading, may declare the rights and other legal relations of any interested party  
 22 seeking such declaration, whether or not further relief is or could be sought.")<sup>1</sup>

23 In addition, because Onyx will seek to show that Bayer's conduct is sufficiently outrageous  
 24 to warrant punitive damages, evidence of the scope of Bayer's allegedly wrongful conduct is relevant  
 25 to such a claim. Bayer points to the general and undisputed requirement that punitive damages must  
 26 bear some relationship to compensatory damages as support for its position that evidence of Bayer's  
 27 other alleged wrongdoing cannot support punitive damages. *See* Reply at 9 (citing *O'Neil v.*

28 <sup>1</sup> Indeed, the cases Bayer cites in support of such a proposition do not even discuss declaratory relief.

1 *Spillane*, 45 Cal.App.3d 147, 161 (1975); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996);  
 2 *Bains LLC v. Arco Prods. Co.*, 405 F.3d 764, 776-77 (9th Cir. 2005); *Lew Wenzel & Co. of S. Cal.,*  
 3 *Inc. v. London Litho Supply Co.*, 563 F.2d 1367, 1368 (9th Cir. 1977). However, these cases do not  
 4 stand for the broad proposition that only evidence which is attached to a specific compensatory  
 5 damages claim is relevant to a claim for punitive damages. Rather, these cases merely discuss the  
 6 difficulty of awarding punitive damages when the plaintiff has suffered no compensable harm  
 7 whatsoever, or when the amount of damages is out of proportion to the amount of compensatory  
 8 damages. This does not answer the question of whether evidence for which the plaintiff does not  
 9 claim damages may nonetheless inform a jury's determination of whether the defendant's conduct is  
 10 worthy of punitive damages.

11 Indeed, on this question, *BMW* indicates that evidence that does not go directly to  
 12 compensatory damages is nonetheless relevant and admissible. In *BMW*, the Supreme Court  
 13 explicitly noted that conduct which could not form the basis of a punitive damages award—BMW's  
 14 out-of-state conduct which was not unlawful in those states—was nonetheless relevant. *See BMW*,  
 15 517 U.S. at 574 n.21 ("Of course, the fact that the Alabama Supreme Court correctly concluded that  
 16 it was error for the jury to use the number of sales in other States as a multiplier in computing the  
 17 amount of its punitive sanction does not mean that evidence describing out-of-state transactions is  
 18 irrelevant in a case of this kind. To the contrary, as we stated in *TXO Production Corp. v. Alliance*  
 19 *Resources Corp.*, 509 U.S. 443, 462, n.28 (1993), such evidence may be relevant to the  
 20 determination of the degree of reprehensibility of the defendant's conduct."). The Court also  
 21 considered evidence of potential harm. *Id.* at 575, 581-82. Bayer can thus point to no case that  
 22 suggests that each specific example of wrongdoing must be attached to a compensable damages  
 23 claim in order to be relevant to its claim that Bayer breached its fiduciary duties and should pay  
 24 punitive damages for its conduct.<sup>2</sup>

25 <sup>2</sup> Bayer's analysis of *Bradbury*, originally cited by Onyx, is similarly flawed. *See* Reply at 9 (citing *Bradbury v. Phillips*  
 26 *Petroleum Co.*, 815 F.2d 1356, 1364 (10th Cir. 1987). Bayer seeks to distinguish *Bradbury* based on the fact that the prior  
 27 conduct at issue in that case—which the court found admissible to show the absence of mistake or accident—had resulted  
 28 in compensable damages. Yet *Bradbury's* analysis does not turn on the fact that the defendant had paid damages to past  
 complainants. Indeed, such a claim is nonsensical because the current plaintiff was not asserting any right to, or harm from,  
 those previous acts. Thus, such conduct was admissible despite the fact that it did not directly support any damage claim or  
 independent cause of action by the plaintiff. Rather, the key to the dispute was that the defendant had engaged in other,



Accordingly, Bayer has failed to demonstrate that this evidence is irrelevant. *See* Fed. R. Evid. 401 (defining relevant evidence broadly to include any testimony “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”).

Bayer also contends that this evidence would be prejudicial under Rule 403, and should be excluded on that basis. However, given its relevance as noted above, Bayer has failed to demonstrate that the prejudicial result from its introduction would substantially outweigh its probative value. Fed. R. Evid. 403. Bayer asserts that this evidence would distract and mislead the jury, and lead to a series of mini-trials. However, Onyx has alleviated most of these concerns by eliminating most of the indications at issue. In addition, the fact that Bayer will need to put on additional witnesses to explain and defend its conduct with respect to the same plaintiff, under the same contract, does not lead to the kind of prejudice or potential confusion that substantially outweighs the probative value of this evidence. *Cf. Tennison v. Circus Circus Enterprises, Inc.*, 244 F.3d 684, 690 (9th Cir. 2001) (in sexual harassment case, finding that the exclusion of evidence regarding complaints by other, non-plaintiff employees years prior to the conduct at issue in that action was not an abuse of discretion). The evidence is admissible under 403.

Finally, Bayer argues that this evidence is inadmissible character evidence under Rule 404(b), which prohibits “[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith.” The Court is not persuaded. As with its arguments discussed above, here Bayer ignores Onyx’s non-damages claims, for which evidence of Bayer’s alleged blocking of Nexavar in other indications is not “other crimes, wrongs, or acts,” but rather is part of the same conduct Onyx challenges here and against which it seeks declaratory and punitive relief. Moreover, Rule 404(b) allows for such character evidence where it may show “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” While Bayer is correct that motive is not relevant in an action seeking contract damages, *see Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 516 (1994), Onyx has asserted

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relevant bad acts, regardless of whether each of those acts were legally cognizable claims, that indicated a pattern of bad conduct sufficient to justify punitive damages.



1 tort claims as well as contract claims in this action, and as explained at the hearing, Bayer's motive is  
2 relevant to a claim sounding in tort.<sup>3</sup>

3 Accordingly, the Court DENIES without prejudice Bayer's motion to exclude evidence of its  
4 alleged efforts to block Nexavar's development in trials other than Breast AI and CRC-KRAS.

5 3. Evidence Relating to Othello

6 Bayer seeks to exclude any documents related to Project Othello, its internal codename for  
7 discussions about its potential acquisition of Onyx in 2009. Mot. at 8. Bayer argues that these  
8 documents are irrelevant because Bayer never acquired Onyx, and prejudicial under Rule 403.

9 Given the content of these documents—which include admissions that Onyx may use to seek  
10 to rebut numerous positions Bayer is taking in this litigation—Bayer has failed to demonstrate that  
11 they are irrelevant or substantially more prejudicial than probative. As Onyx points out, *see* Opp. at  
12 16-17, the fact that Bayer never acquired Onyx does not negate the relevance of its discussions to  
13 this litigation, as those discussions concerned the relationship and acknowledged potential conflicts  
14 between DAST and Nexavar, Bayer's obligations under the contract, and Bayer's ongoing  
15 relationship with Onyx. *See, e.g.*, Trial Exh. 384 at -082-83, (indicating that the “[c]ommercial  
16 value of DAST is limited by Onyx partnership” and that DAST is in “direct competition with  
17 Nexavar” and has “very similar molecular structure”); Trial Exh. 397 (evaluating economic effects  
18 of developing DAST for certain indications instead of Nexavar); Trial Exh. 416 (discussing options  
19 for switching certain Nexavar trials to DAST); Trial Exh. 440 (discussing benefits of developing  
20 DAST over Nexavar in certain indications). This evidence is probative of Bayer's knowledge and  
21 thus its potential motives irrespective of the fact that it ultimately did not acquire Onyx.

22 Finally, as with the evidence discussed above in the second motion in limine, here Bayer has  
23 failed to demonstrate prejudice that would substantially outweigh the probative value of these  
24 documents as a whole. Again, Bayer assumes that this litigation solely involves a claim for breach

25  
26 <sup>3</sup> In its reply, Bayer makes the cursory argument that all of Onyx's claims actually sound in contract, and that therefore its  
27 tort claims are not viable. *See* Reply at 11 and n.4. However, Bayer has not moved for, nor has the Court granted, dismissal  
28 or summary judgment on this basis. Thus, the fact is that Onyx's tort claims remain in the litigation; Bayer's cursory  
dispute whether a fiduciary duty exists, Onyx should be precluded from introducing evidence that might tend to show breach  
of such a duty. *See* Reply at 11 n.4. This argument is meritless because it presumes Bayer will prevail on a disputed issue.

1 of contract. *See* Reply at 14. Though the Court need not determine whether this evidence would be  
 2 admissible if only contract claims were asserted, because bad faith and breach of fiduciary duty are  
 3 at issue here, this evidence is sufficiently probative—notwithstanding its potential damaging effect  
 4 on Bayer—to bring it outside the confines of 403.

5 Bayer’s motion to exclude these documents is DENIED without prejudice to more tailored  
 6 objections on a case-by-case basis.

7 4. Evidence of Damages

8 Bayer seeks to exclude any testimony from Onyx’s damages expert, Iain Cockburn, as to  
 9 Onyx’s claimed damages from lost profits due to Bayer’s alleged blocking of Nexavar’s  
 10 development in Breast AI and CRC-KRAS indications. Mot. at 11. Bayer argues that Cockburn’s  
 11 testimony cannot establish that Onyx suffered damages with reasonable certainty, as is required  
 12 under California law. *See Vestar Development II, LLC v. General Dynamics Corp.*, 249 F.3d 958,  
 13 961 (9th Cir. 2001) (“It has long been settled in California that ‘the proof must establish with  
 14 reasonable certainty and probability that damages will result in the future to the person wronged.’”) (quoting *Caminetti v. Manierre*, 23 Cal.2d 94, 101, 142 P.2d 741, 745 (1943) (in bank)).

15 Bayer’s arguments are nearly identical to those it raised in its motion for summary judgment,  
 16 which Judge Patel denied. Indeed, much of Bayer’s motion appears to have been cut and pasted  
 17 from its earlier summary judgment motion. In her order, Judge Patel rejected Bayer’s assertion that  
 18 a 57% percent chance of FDA approval is insufficient to qualify as “reasonably certain.” *See*  
 19 Memorandum & Order, Docket No. 143, at 20. She found that “Onyx has raised at least an issue of  
 20 fact as to the propriety of its requested damages.” *Id.* Bayer has not requested leave to file a motion  
 21 for reconsideration of that ruling. *See* Civ. L.R. 7-9.

22 Moreover, viewed independently, this Court agrees with Judge Patel’s conclusion. Bayer  
 23 argues that a 57-62% chance of FDA approval is insufficient as a matter of law to create a  
 24 “reasonable certainty.” Mot. at 13. In addition, Bayer contends that Onyx should not be permitted  
 25 to present evidence of “risk-adjusted damages,” which it claims demonstrate that Onyx’s damages  
 26 claims are speculative. *See* Mot. at 15-16. As Onyx has agreed at oral argument not to introduce  
 27 any evidence of risk-adjusted damages, the Court considers only the reasonable certainty argument.  
 28

Bayer can point to no case, nor has Judge Patel or this Court uncovered such a case, in which California courts have mandated a percentage of certainty above 57% in order to constitute “reasonable certainty.” *See* Memorandum & Order, Docket No. 143, at 20. Rather, most cases addressing reasonable certainty adhere to a qualitative approach, and the cases Bayer cites do not support the kind of wholesale rejection of evidence that Bayer requests from this Court. For example, as Judge Patel found, the principal case on which Bayer relies for its assertion that recovering damages for lost profits in pharmaceutical products is “exceedingly difficult,” *see AlphaMed Pharm. Corp. v. Arriva Pharm., Inc.*, 432 F. Supp. 2d 1319 (S.D. Fla. 2006), *aff’d*, 294 Fed. Appx. 501 (11th Cir. 2008), is distinguishable on numerous grounds from the instant case. *See* Memorandum & Order at 19 (emphasizing that *AlphaMed*, unlike this case, involved a product that had never been tested, might have been illegal to distribute, and for which it was uncertain whether there was a sufficient research and development budget, among other differences). In another case on which Bayer relies, *Matthews v. Atchison, Topeka & Santa Fe Railway Co.*, 54 Cal. App. 2d 549, 560 (1942), the court was referring to a case in which the court reduced, rather than eliminated, damages to account for their lack of certainty.

Under California law, damages evidence found to be too speculative faced more uncertainty than is present in this case, in which Nexavar has already been approved for two cancer indications and the parties have experience successfully promoting its sale. *See, e.g., Kids' Universe v. In2Labs*, 95 Cal.App.4th 870, 887-888 (2002) (finding expert testimony insufficient to demonstrate lost profits where a small toy store claimed that flood damage to the store caused by defendant led to \$50 million in lost profits because Plaintiff’s new website would have allowed it to compete in the Internet toy marketing business); *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 962 (9th Cir. 2001) (finding lost profits claim too speculative for breach of agreement to negotiate where plaintiff sought “future profits that it hoped to earn from the shopping center it had planned to build on the parcel it was attempting to buy”); *Eisenmayer v. Leonardt*, 148 Cal. 596, 601 (1906) (affirming exclusion of testimony as to value of unissued stock for company never formed because there were “no facts stated—either real or hypothetical—as a basis for an intelligent opinion”); *Greenwich S.F., LLC v. Wong*, 190 Cal. App. 4th 739, 766 (2010) 1(finding lost profits claim too

speculative where the plaintiff assumed, rather than proved, the reasonable certainty of future predicate events upon which the damages depended); *Fisher v. Hampton*, 44 Cal. App. 3d 741, 749 (1975) (finding lost profits evidence too speculative where “there was no testimony that any oil could be recovered at a profit from the drilling of one well, and there was no testimony as to the extent of possible profits from the one initial well.”); *Boyer v. Wells*, No. B205345, 2008 WL 3984342, at \*8 (Cal. Ct. App. Aug. 29, 2008) (“Blaha’s testimony that there are generally unforeseen rebuilding costs was too speculative to require the court to infer that there would be such costs in this case.”). In contrast to these cases, courts allow for projections of lost profits for unestablished businesses when those projections are rooted in sound factual and statistical analysis, even though such testimony does not lend itself to absolute certainties with respect to future damages. *See Kids’ Universe v. In2Labs*, 95 Cal.App.4th 870, 884 (2002) (“[I]f the business is a new one or if it is a speculative one . . . , damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like.”); *Parlour Enterprises, Inc. v. Kirin Group, Inc.*, 152 Cal. App. 4th 281, 288 (2007) ([E]xpert testimony alone is a sufficient basis for an award of lost profits in the new business context when the expert opinion is supported by tangible evidence with a ‘substantial and sufficient factual basis’ rather than by mere ‘speculation and hypothetical situations.’”) (quoting *Kids’ Universe*, 95 Cal. App. 4th at 885); *1A&M Produce v. FMC Corp.*, 135 Cal. App. 3d 473, 494 (1982) (finding lost profits from destroyed tomato crop, which plaintiff had never grown before, proven to reasonable certainty where plaintiff “provide[d] evidence regarding the size of the crop and general market price for that type of tomato, the fact that he was an experienced farmer, the condition of the tomatoes pre-harvest, and the fact that there was no indication anything else would have ruined the crop had the machine functioned properly”); *see also Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1176 (3d Cir. 1993) (finding lost profits from franchisees that never opened proven to reasonable certainty despite the fact that the witness “did not offer any documentary evidence comparing his operation to those of his competitors, did not discuss the market conditions for quick-lube centers generally, did not assess the impact of the stock market crash of 1987 on the likelihood of whether Lightning Lube would have gone public, and did not consider the impact of

1 the 1990-91 recession on lube sales generally”).

2 Those cases that do attach some mathematical component to the reasonable certainty analysis  
3 further support Onyx’s view that a probability of greater than 50% is sufficient to create a  
4 “reasonable certainty.” *See Wagner v. Apex Marine Ship Mgmt. Corp.*, 83 Cal. App. 4th 1444, 1452  
5 (2000) (discussing the need for a more flexible construction of the statute of limitations in latent  
6 disease cases because otherwise “most plaintiffs will be unable to prove that the likelihood of the  
7 future illness is “reasonably certain,” *i.e.*, greater than 50 percent, as courts generally require [for  
8 damages.]”) (quoting *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 119 (D.C. Cir. 1982)  
9 (“Recovery of damages for speculative or conjectural future consequences is not permitted. To meet  
10 the “reasonably certain” standard, courts have generally required plaintiffs to prove that it is more  
11 likely than not (a greater than 50% chance) that the projected consequence will occur.”); *see also*  
12 *Henderson v. Sheahan*, 196 F.3d 839, 850 (7th Cir. 1999) (“Although the Illinois courts have yet to  
13 squarely define the meaning of “reasonable certainty,” other jurisdictions have construed it to  
14 require a showing that it was more likely than not (*i.e.*, greater than fifty percent probability) that the  
15 plaintiff would develop the serious injury in the future [to recover damages.]”) (citing cases from the  
16 Fifth and Sixth Circuits); *Weeks Dredging & Contracting, Inc. v. B. Turecamo Towing Corp.*, 482 F.  
17 Supp. 1053, 1058 (E.D.N.Y. 1980) (describing reasonably certain lost profits as “what profits more  
18 probably than not would have been earned had the incident not transpired”). Bayer contends that  
19 *Wagner* is inapposite because it concerns latent disease in a tort action. However, though not  
20 dispositive of the question, *Wagner*, like the instant case, involved analysis of a contingent event  
21 that affected the availability of future damages. In *Wagner*, it was latent asbestos-related disease,  
22 whereas here, it is FDA approval. Moreover, as Onyx points out, courts have treated tort and  
23 contract cases as analogous for purposes of establishing future damages. *See Kids’ Universe*, 95  
24 Cal. App. 4th at 883.

25 At the least, then, California law provides no indication that an estimated 57% likelihood of  
26 FDA approval cannot satisfy the reasonable certainty requirement. Moreover, as Judge Patel noted,  
27 Onyx has pointed out that 57% is a low bar in this case, as it estimates an 80% likelihood that at  
28

1 least one of the indications will succeed.<sup>4</sup> See Memorandum & Order at 20 (citing Onyx Opp. to  
 2 MSJ, Docket No. 96, at 24). Accordingly, the Court cannot conclude that Onyx's expert testimony  
 3 is insufficient as a matter of law to demonstrate damages with reasonable certainty. Bayer's motion  
 4 is denied.

### 5 **III. WITNESSES**

6 A witness or exhibit not listed in a party's pretrial conference statement may not be called or  
 7 used without good cause. This rule does not apply to true rebuttal witnesses (other than experts).  
 8 Defense witnesses are normally considered case-in-chief witnesses, not "rebuttal" witnesses.

9 The parties shall file their final witness lists by noon, September 30, 2011.

### 10 **IV. EXPERT REPORTS**

11 The parties shall lodge all expert reports, including their supplemental expert reports, with  
 12 the Court no later than Wednesday, September 28, 2011.

### 13 **V. EXHIBITS**

14  
 15 <sup>4</sup> In its summary judgment briefing, Bayer argued that Onyx had to prove each source of damages—the  
 16 Breast AI and the CRC—separately, and therefore that it could not use the combined 80% probability of one  
 17 indication receiving approval to establish reasonable certainty. See Reply ISO MSJ, Docket No. 106, at 13  
 18 n.11. However, California law is clear that a party must only prove *the fact of damages* to a reasonable  
 19 certainty; it does not mandate that a party prove each individual source of damages separately, as long as all  
 20 of those sources stem from the defendant. *Israel v. Campbell*, 163 Cal. App. 2d 806, 816 (Cal. App. 1958)  
 21 (discussing difficulty of awarding damages when some damages may have been caused by defendant and  
 22 others may not be defendant's responsibility, but finding that problem did not apply where "[r]espondent's  
 23 damages came from only one source, namely, appellant's default"); see also *Guntert & Zimmerman Const.*  
 24 *Div., Inc. v. S.G.M.E. Usine Moser S.A.*, No. C-88-3866, 1992 WL 12602677, at \*4 (N.D. Cal. June 3, 1992)  
 25 ("Although certainty as to the fact of damages must exist, a more liberal rule is applied in determining the  
 26 amount of the damages."). Thus, if Onyx is able to present evidence at trial sufficient to demonstrate with  
 27 reasonable certainty that one of the indications would succeed, whether it can prove that both would succeed  
 28 goes more to the amount, rather than the existence, of damages. For those determinations, California uses a  
 liberal evidentiary rule. *Grupe v. Glick*, 26 Cal.2d 680, 691-93 (Cal. 1945); *California Lettuce Growers v.*  
*Union Sugar Co.*, 45 Cal.2d 474, 486-87 (1955) ("[W]hen it clearly appears that a party has suffered damage  
 a liberal rule should be applied in allowing a court or jury to determine the amount, and that, given proof of  
 damage, uncertainty as to the exact amount is no reason for denying all recovery.") (quotation omitted); *Hunt*  
*Foods, Inc. v. Phillips*, 248 F.2d 23, 33 (9th Cir. 1957) (restating California rule); *Dillingham-Ray Wilson v.*  
*City of Los Angeles*, 182 Cal. App. 4th 1396, 1406 (2010) (same); see also *Macken v. Martinez*, 214 Cal. App.  
 2d 784, 790 (1963) ("As defendant's wrongful conduct made the exact ascertainment of damages difficult, he  
 cannot complain because the court must make an estimate of the damage and not an exact computation,  
 provided, of course, that the estimate is a reasonable one."); *McConnell v. Corona City Water Co.*, 149 Cal.  
 60, 66 (Cal. 1906) ("It is no objection to . . . recovery that [damages] cannot be directly and absolutely  
 proved."). "It is within the sound discretion of the trier of fact to select the formula most appropriate to  
 compensate the injured party." *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932, 938, 939 (9th Cir. 1999)  
 (finding that the court had exercised its discretion appropriately by "considering several possible theories for  
 determining damages" and "declining to award compensation where it felt calculations were impermissibly  
 speculative") (citing *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*, 1 Cal.3d 586, 599 (1970)).



Attached to this order as Exhibit A, the Court provides its rulings on Onyx's representative exhibits to which Bayer objects. Attached as Exhibit B, the Court provides its rulings on Bayer's representative exhibits to which Onyx objects. At the pretrial conference herein, the Court explained the principles it employs in adjudicating relevance and admissibility. The parties are directed to meet and confer and resolve any remaining differences on objections. The parties shall submit a revised narrowed list of exhibits and any remaining objections by September 28, 2011.

## VI. DEPOSITION DESIGNATIONS

The Court has considered the parties' representative deposition designations and objections, Docket No. 202. With respect to Bayer's designation number 5, Robert Jones 22:23-23:1, the Court reserves this question for trial as to whether Bayer has laid a sufficient foundation for the necessity of impeachment. With respect to Bayer's designation number 6, Robert Jones 113:25-114:22, the Court reserves the question for trial as it is keyed to Exhibit 1077, for which the Court has tentatively overruled Onyx's hearsay objection subject to a proper foundation at trial. *See* Exhibit B. With respect to all other representative deposition designations, the Court overrules the objections. As with the exhibits, the parties shall meet and confer and resolve objections. The parties shall submit a revised (narrowed) list by September 28, 2011.

## VII. VOIR DIRE

Based on the parties' submissions and the Court's general practice, the Court intends to ask the following voir dire questions during jury selection. Counsel will be allowed a brief (20 minutes) follow-up voir dire after the Court's questioning.

1. Name
2. City of residence
3. Occupational Status
4. Organizations
5. Hobbies
6. Marital Status
7. Spouse's occupation
8. Children (including ages).



9. If a juror on another case
10. If ever a grand juror
11. If ever in the military.
12. Who is (or was) your employer?
  - a. How long have you worked (or did you work) for that employer?
13. Please describe your educational background, including where you went to school, your major areas of study, and any degrees you have received.
14. The companies involved in this dispute are Bayer Corporation, Bayer AG, Bayer Healthcare LLC, Bayer Schering Pharma AG, Bayer HealthCare Pharmaceuticals, Inc., Bayer HealthCare Pharmaceuticals LLC (collectively referred to here as “Bayer”) and Onyx Pharmaceuticals, Inc. (referred to here as “Onyx”).
  - a. Other than in reference to the product Bayer Aspirin, have you ever heard of Bayer?
  - b. Have you ever heard of Onyx?
  - c. Have you, any member of your family, or any of your close friends ever worked for Bayer or Onyx or had any business relationship with Bayer or Onyx? Identify the person and explain.
  - d. Have you or any member of your immediate family ever owned any stock, bond, or ever had any financial interest in Bayer or Onyx?
15. The law firms representing the parties involved in this dispute are Cooley LLP (formerly known as Cooley Godward and Cooley Godward Kronish), Morrison & Foerster LLP and Bartlit Beck Herman Palenchar & Scott LLP. Some of the specific attorneys involved are:
  - From the law firm of Bartlit Beck Herman Palenchar & Scott LLP:
  - Phil Beck
  - Mark Levine
  - Brian Swanson
  - Scott McBride

From the law firm of Morrison & Foerster:

Alison Tucher

From Bayer:

Scott Meece

From the law firm of Cooley LLP:

Stephen C. Neal

Martin S. Schenker

Michelle S. Rhyu

Benjamin Kleine

From Onyx:

Suzanne Shema

16. Do you have any college education, training, experience, or current or past employment in the following areas?

(1) Pharmaceuticals

(2) Medicine or healthcare

(3) Biotechnology

(4) Drug Discovery or Development

(5) Chemistry including Medicinal Chemistry and Chemical Engineering

(6) Biology

17. The products that will be discussed in this case are cancer-fighting drugs.

(A) Have you, a family member or a close friend ever had cancer?

(B) Have you, a family member or a close friend ever taken the medication Nexavar®?

18. Do you have any personal experience or training specifically involving the drafting or review of contracts, or dealing with a dispute over the terms of a contract, either in connection with your job or as part of your personal life?

19. Have you or an immediate family member ever started a business?

20. Do you have any personal knowledge of this case, or have you read about or heard it

discussed, or have an opinion regarding it?

21. Have you or any member of your immediate family ever been a party to a lawsuit?

Please describe.

a. Were you the plaintiff or defendant?

b. How was the case resolved?

c. Will your experiences from that lawsuit impact your ability to decide this case in a

fair and impartial way?

22. Are you or any member of your family an attorney or law student?

23. The following is a list of individuals who might appear as a witness in this case. Are you related to or personally acquainted with any of these individuals?

1. Lila Adnane

2. Shripad Bhagwat

3. Hans Bishop

4. Klaus Brandau

5. Gideon Bollag

6. Laura Brege

7. Iain Cockburn

8. N. Anthony Coles, Jr.

9. Jacques Dumas

10. Axel Eble

11. Henry (Hank) Fuchs

12. Mark Gelder

13. Greg Giotto

14. Arthur Higgins

15. Bob Jones

16. Juergen Lasowski

17. Christopher Lipinski

**United States District Court**  
For the Northern District of California

18. Nathalie Lokker

19. Ted Love

20. Tim Lowinger

21. John Lyons

22. Kemal Malik

23. Bob Mass

24. Frank McCormick

25. Joerg Moeller

26. Chris Peetz

27. Wolfgang Plischke

28. Len Post

29. Paolo Pucci

30. Mohan Rao

31. Hollings Renton

32. Bernd Riedl

33. Rob Rosen

34. Eric Rowinsky

35. Peter Sandor

36. Bill Scott

37. Scott Wilhelm

38. Todd Yancey

24. Do you have any other experience, opinion, or matter which you believe should be called to the Court's or the parties' attention that might have some bearing on your qualifications or ability to sit as a juror on this case, or which you think may prevent you from rendering a fair and impartial verdict based solely upon the evidence and the Judge's instructions as to the law?

25. Have you ever been involved in a serious business dispute? Briefly describe the nature of the dispute and how it was resolved.

**VIII. JURY INSTRUCTIONS & VERDICT FORM**

The Court shall address the verdict form at a subsequent date.

Regarding instructions, as the Court noted at the pretrial conference, the parties are directed to meet and confer and try to reach an agreement on the instructions. The parties shall file with the Court no later than noon Friday, September 23, 2011, a set of agreed upon instructions and the parties' respective positions and proposed language where they disagree.

In addition to the above, the parties shall provide the Court with any stipulated facts to be read to the jury, to be filed on September 23, 2011, along with the jury instructions.

IT IS SO ORDERED.

Dated: September 21, 2011



EDWARD M. CHEN  
United States District Judge